THE CONSTITUTIONAL RIGHT TO KEEP AND BEAR ARMS

THE federal and most of the state constitutions contain a provision guaranteeing to the people "the right to keep and bear arms." Judge Cooley in his well-known and standard work on Constitutional Limitations, published in 1868, wrote of this provision: "How far it may be in the power of the legislature to regulate the right we shall not undertake to say. Happily there neither has been nor, we may hope, is there likely to be much occasion for an examination of that question by the courts." That hope is now fast disappearing. The greater deadliness of small firearms easily carried upon the person, the alarming frequency of homicides and felonious assaults with such arms, the evolution of a distinct class of criminals known as "gunmen" from their ready use of such weapons for criminal purposes, are now pressing home the question of the reason, scope, and limitation of the constitutional guaranty of a right to keep and bear arms,— of the extent of its restraint upon the legislative power and duty to prohibit acts endangering the public peace or the safety of the individual.

The guaranty does not appear to have been of a common-law right, like that of trial by jury. On the contrary, it was as early as 1328 declared by the Statute of Northampton, 2 Edw. III, ch. 3, that no man should "go nor ride armed by night or by day in fairs, markets, nor in the presence of the justices or other ministers, nor in no part elsewhere upon pain," etc. Such conduct was probably regarded as tending to terrify peaceful people and to provoke breaches of the peace. At any rate, it was indictable under the common law. Naturally the Statute of Northampton and the practice under it became the common law of the English colonies in America.[1] Further, a statute of 22 Car. II, ch. 25, § 3, provided that no person who had not lands of the yearly value of £100 other than the son and heir of an esquire or other person of higher degree, should be allowed even to keep a gun. Whatever the purpose of this statute, whether to preserve game or the public peace,

[1] Bishop, STATUTORY CRIMES, § 784.

yet read in connection with the earlier statute of Edward III, it shows that a right to keep and bear arms was not regarded as a fundamental right of every Englishman.

On the other hand, from very early times landed proprietors were required to have in readiness, according to their degree and estate, specified arms and equipments and men-at-arms at their own expense for military service when required by the government. These landed proprietors, with their tenants and retainers thus armed, constituted the military forces, the *milites*, the militia of the kingdom. At the time of the restoration of the monarchy in the person of Charles II, no other armed force was recognized as lawful.

That king, however, having seen during his exile in France the autocratic power of a king possessing a standing army independent of the people and under his sole control, began himself to form the nucleus of such an army by organizing a body of soldiers as guards of his court and person, and armed, equipped, and paid out of the royal revenues. His successor, James II, increased this nucleus into a regular army for general military service, greatly to the dissatisfaction of his subjects, Whig and Tory alike. Finally, after the suppression of Monmouth's rebellion, he caused many of his Protestant subjects of militia status to be deprived of their arms on the plea that it was necessary for the preservation of the peace and the security of the government. In the Declaration of Rights proclaimed by the Convention Parliament after the flight of James, these acts were recited as having been on his part an "endeavor to subvert and extirpate the laws and liberties of this kingdom" and as "contrary to law." In the subsequent statutory Bill of Rights based on that Declaration, it was enacted "That the raising or keeping a standing army within the kingdom in time of peace unless it be with the consent of parliament is against the law." It was also enacted in the next clause "That the subjects which are Protestants may have arms for their defense suitable to their condition, and as allowed by law."

It is quite evident from the foregoing that in the seventeenth century in England the assertion of the right of Protestant subjects to have arms was to preserve "the laws and liberties of the Kingdom" and not at all to enable a subject to violate them.

In the American colonies, with their small revenues and beset

as they were with savage and other enemies, it was deemed necessary that every man of military age and capacity should provide himself with arms and be ready to bear them in defense of himself and his neighbors and the colony at large. Accordingly every man of military age and capacity was enrolled for military service and was required by law to provide and keep at his own expense specified arms and equipments for such service. The colonies had no other means of defense against foreign or domestic enemies, as they maintained no standing armies whatever. The only regular troops in the colonies were those sent out from England and under the direct command of royal instead of colonial officers. The presence of these troops in times of peace was very distasteful to the people of the colonies. One of the grievances recited in the Declaration of Independence was that the king had kept among the people of the colonies in times of peace standing armies without the consent of their legislatures.

Through their long controversies with the king and Parliament as to their respective rights, the people of the colonies had become familiar with English political history and the various charters of English liberties, including the Bill of Rights of the time of William and Mary. In this last the clauses relating to standing armies and the right of the subjects to have arms for their defense were closely related. This right and a reliance on a citizen soldiery or militia were coupled together in their thought and experience, and we find that connection more or less clearly expressed in the American Bills of Rights.

In the federal Bill of Rights the language is: "A well-regulated militia being necessary for the security of a free state, the right of the people to keep and bear arms shall not be infringed." The fear that standing armies may be dangerous to "the laws and liberties" of the people is expressed in the constitutional provision that no appropriation of money for raising and supporting armies shall be for more than two years, and that there should be no quartering of soldiers on the people in time of peace.

In the Massachusetts Bill of Rights the language is: "The people have a right to keep and bear arms for the common defense, and as in times of peace armies are dangerous to liberty, they ought not to be maintained without consent of the legislature." In that of Connecticut: "Every citizen has a right to bear arms in defense

of himself and the state." In that of Pennsylvania: "The right of the citizens to bear arms in defense of themselves and the state shall not be questioned." In that of South Carolina: "The people have a right to keep and bear arms for the common defense." In that of Virginia: "A well-regulated militia composed of the body of the people is the proper, natural, and safe defense of a free state." In some of the states the language is condensed into "The right of the people to keep and bear arms shall not be infringed."

But, however concise the language of the provision, it should be construed in connection with the well-known objection to standing armies and the general belief in the need and sufficiency of a well-regulated militia for the defense of the people and the state. Thus construed it is a provision for preserving to the people the right and power of organized military defense of themselves and the state and of organized military resistance to unlawful acts of the government itself, as in the case of the American Revolution. To quote Bishop, Statutory Crimes, § 793: "In reason the keeping and bearing of arms has reference to war and possibly also to insurrections where the forms of war are so far as possible observed." The phrase itself, "to bear arms," indicates as much. The single individual or the unorganized crowd, in carrying weapons, is not spoken of or thought of as "bearing arms." The use of the phrase suggests ideas of a military nature.

From the foregoing premises I think there are deducible several propositions as to the power of the legislature to restrict and even forbid carrying weapons by individuals, however powerless it may be as to the simple possessing or keeping weapons.

The constitutional guaranty of a right to bear arms does not include weapons not usual or suitable for use in organized civilized warfare, such as dirks, bowie knives, sling shot, brass knuckles, etc., and the carrying of such weapons may be prohibited. Only persons of military capacity to bear arms in military organizations are within the spirit of the guaranty. Women, young boys, the blind, tramps, persons *non compos mentis*, or dissolute in habits, may be prohibited from carrying weapons. All persons may be forbidden to carry concealed weapons. Military arms may not be carried in all places even by persons competent to serve in the militia. They may be excluded from courts of justice, polling places,

school houses, churches, religious and political meetings, legislative halls and the like. So the carrying of even military arms in street parades and other public demonstrations may be forbidden.[2] In *Presser* v. *Illinois*, 116 U. S. 264, in speaking of a statute of Illinois, the court said:

"We think it clear that the sections under consideration, which only forbid bodies of men to associate together as military organizations or to drill or parade with arms in cities and towns unless authorized by law, do not infringe the right of the people to keep and bear arms."

Lastly, I submit that the right guaranteed is not so much to the individual for his private quarrels or feuds as to the people collectively for the common defense against the common enemy, foreign or domestic. The guaranty is to insure the safety of the people, their "laws and liberties," against assaults from any source or quarter, but not to give individuals singly or in groups uncontrollable means of aggression upon the rights of others. Granting that the individual may carry weapons when necessary for his personal defense or that of his family or property, it is submitted that he may be forbidden to carry dangerous weapons except in cases where he has reason to believe and does believe that it is necessary for such defense. In fine, I venture the opinion that, without violence to the constitutional guaranty of the right of the people to bear arms, the carrying of weapons by individuals may be regulated, restricted, and even prohibited according as conditions and circumstances may make it necessary for the protection of the people.

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[2] Commonwealth *v.* Murphy, 166 Mass. 171, 44 N. E. 138 (1896).